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ABSTRACT

This paper on the legal rights and remedies of high school dropouts and potential dropouts is a study of the plight of the substantial number of students who drop out of the New York public school system before considering high school graduation. Further, it questions the availability of legal rights to students and parents. Three sections constitute the document: (1) an introduction discussing the nature and magnitude of the problems; (2) an analysis of the manner in which the Board of Education violates New York State laws by failing to provide adequate staff for attendance services, employment certificate procedures, auxiliary schools or dropout referral programs, and suspension and exemption procedures; and (3) an examination of the constitutional right to a suitable education for all educationally deprived students. The latter section is analyzed in terms of a number of recent legal cases concerning handicapped children, non-English speaking students, and state institution patients, which cases are said to establish precedents for asserting a right to a meaningful educational opportunity. A discussion of what are labeled as manageable standards for effectuating judicial relief, considered under the specific headings of equal resources, bona fide efforts to provide suitable education, and attainment of minimum education standards, is included in the summary. (Author/AM)

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Legal Rights and Remedies of High School Dropouts and Potential Dropouts

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In this paper, the plight of the substantial number of students who drop out or are "pushed out" of the New York City public school system before high school graduation is considered. Are there any legal rights or remedies available to these students and/or to their parents?

The basic conclusion drawn here is that certain practices of the New York City Board of Education adversely affect dropouts and potential dropouts and are in violation of specific provisions of state law. Furthermore, substantial precedent exists for establishing a Constitutional right to provision of a "suitable education" for each child. The enforcement of this mandate would compel the school system to provide programs and services directly related to the needs and capabilities of educationally deprived students.

The discussion which follows is thus divided into three sections: First is an introductory discussion of the nature and magnitude of the problem at hand. Second is an analysis of the manner in which Board of Education practices violate the specific provisions of State Education law in failing to provide adequate attendance services, employment certificate procedures,

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Statutory references included by the author have been deleted in several places by the editors. Readers interested in these citations can contact the ERIC Clearinghouse on Urban Education, Box 40, Teachers College, New York 10027.

auxiliary schools for dropouts, and suspension and exemption procedures. Finally, the Constitutional right to a "suitable education" for all educationally deprived students is considered in light of recent cases establishing a specific right to "suitable education" and "suitable treatment" for handicapped children, non-English speaking students, and inmates of state institutions. A discussion of appropriate "manageable standards" for effectuating judicial relief is included in this section.

THE PROBLEM

The magnitude of the prolonged problem of school dropouts is indicated by the Fleischmann Commission's finding that only 55% of New York City students who entered public secondary schools in 1965 went on to graduate, as compared with 74% for the rest of the State.(1) Only 51.1% of New York City's black students and 44.8% of its Hispanic students who entered the ninth grade in 1967 were still enrolled four years later, as compared with 76.1% of "other" students.(2) A recent study indicates that the dropout percentage from many of New York City's academic high schools increased between 1970 and 1973.(3)

These extremely high dropout figures are presaged by the city's extraordinary truancy rates. In 1972-73, the average daily attendance in the high schools was 74.25% and the average number of days of absence per pupil on register was 47.39%.(4) These figures (which do not include additional absences from class due to cutting) represent a substantial worsening from the 1965-66 average daily academic high school attendance of 80.4%.(5) In some high schools, especially in ghetto areas, the average daily attendance for 1972-73 was as low as 49%.(6)

The severe negative consequences for the numerous students who fail to attain a minimally adequate education and a high school degree are apparent. They will find their opportunities for gainful employment in our increasingly technological society, and the prospects for meaningful personal fulfillment, substantially restricted. About two-thirds of all workers who never completed high school are employed in unskilled and semiskilled jobs and the unemployment rate among school dropouts has been as high as about 25%--rising to as much as 70% in slum neighborhoods of the large cities.(7) The costs to society, in terms of higher unemployment and welfare subsidies and higher crime and delinquency rates are immense.(8)

Admittedly, many of the individuals who become truants and ultimately high school dropouts, originally came to the schools with serious social, emotional and learning problems. The educational system cannot be expected to overcome all of the effects of our society's social, economic and political ills, but neither can it write-off youngsters from troubled backgrounds without seriously attempting to provide programs related to their needs and capabilities. The head of the City's Bureau of Attendance estimates that possibly as many as half of the current dropouts could be retained in school if adequate funds and staff for attendance purposes were available.(9) Further, according to the director of the dropout prevention programs of the United States Office of Education, substantial structural improvements in the school system could "save" 75% of all dropouts.(10)

Despite much talk about dropout prevention over the past decade, and some recent infusions of federal funds for career education programs,[11] the New York City Board of Education has not responded to the needs of potential dropouts with the commitment and resources that are clearly needed. The large, impersonal school system, which is not decentralized on the high school level, still operates overcrowded schools on double and triple sessions, provides grossly inadequate support and guidance services[12] and fails to provide to any substantial degree the types of special programs which professionals in the field[13] and outside anclysts[14] have advocated for reducing dropout and truancy rates.

In the face of the harsh statistic that 40-50% of all high school students are potential dropouts, the Board of Education has implemented a number of alternative programs--mini-schools, satellite schools, street academies and alternative high schools. Yet these programs enroll only about 2% of the high school population.[15] At the same time, present practices permit principals and other school officials to "solve" their problems with difficult students by encouraging them to drop out, even though the parent and the child in some cases express strong desires to stay in school.[16]

Perhaps the most blatant illustration of the system's failure to respond to the needs of the potential dropout is its budgetary allocation formula which, allocates substantially less money on a per capita basis for educationally deprived students. This inequity arises largely from the fact that funds are

distributed to each school according to the daily average number of subjects taken by each student rather than on a strict per capita basis. Thus, if students in a middle-class area are enrolled for an average of seven academic subjects while students in a ghetto area only take five, 40% more money will be provided to the middle-class area school under this basic formula element. By allocating according to course load, the system denies to low achievers 40% additional funding which might have been used to provide them remedial programs or other special services.

Furthermore, because the central office pays all teacher salaries directly and the formula allocates pedagogical "units" to each high school rather than actual dollar appropriations, middle-class schools, which tend to attract more experienced staff, receive the benefits of such experience without having to pay the accompanying salary differentials. In other words, "difficult" schools are denied the savings realized by the system in paying lower salaries to less experienced teachers, savings which might have been used to lower class size or otherwise compensate for disadvantage.

The student course load and teacher salary factors built into the formula more than balance out the slight additional funding provided for alternative schools and the 6.67% additional weighting for pupils retarded at least two years in reading. For example, a recent study found a 50% higher per capita expenditure rate for students at Tottenville High School in Staten Island (87% attendance rate, 10.3% reading retardation rate) than for students

at Franklin K. Lane High School in Brooklyn (49% attendance rate, 51.4% reading retardation rate).(17)

In short, it would appear that the New York City public school system has assumed the inevitability of an accelerating dropout rate and refuses to provide adequate resources and programs geared to the special needs and abilities of potential school leavers. As David Selden, president of the American Federation of Teachers, recently put it:

> "The idea that half our children are not worth educating seems monstrous, and yet this is exactly the effect of what we are now doing. In effect, our schools are based on the concept of the 'marginal child'."(18)

An analysis of the New York State Education Law indicates that the Board's actions and inactions in regard to the potential dropout population are in violation of specific statutory requirements. Furthermore, on the basis of a number of recent federal court decisions, it may be possible to argue for a constitutional right to a provision of "suitable education," the enforcement of which would compel the school system to provide programs and services directly related to the needs and capabilities of educationally deprived students.

VIOLATIONS OF NEW YORK STATE LAW

The New York City Board of Education's failure to provide a meaningful and adequate education to the significant number of students who leave school

before high school graduation is inconsistent with New York State's commitment to public education. Since 1874, New York State has guaranteed the right of free public education to all its children. Article XI, section 1 of the State Constitution specifically requires the Legislature to provide "a system of free common schools, wherein all the children of the state may be educated."

Although the original New York compulsory education act guaranteed only elementary schooling for children between ages eight and fourteen,(19) under the conditions of our contemporary, technological society, a minimally adequate education clearly includes the right to a high school education.(20) Thus, the New York Legislature has specifically provided that "A person over five and under twenty-one years of age is entitled to attend the public schools maintained in the district or city in which such person resides without the payment of tuition" Ed. Law § 3202(1).

Consistent with the state's strong commitment to universal public education, the Legislature has enacted a detailed statutory scheme in order to ensure that all children will receive full educational benefits.* Thus, children between the ages of six and sixteen (New York City has exercised an option to include seventeen-year-olds) must receive full-time instruction, either in a public school or in a private school offering equivalent instruction. The obligation of persons in parental authority to ensure such full-time attendance is specifically delineated.

*Education Law Article 65.

(See also People ex rel Belfon v. Anonymous 44 Misc. 2d 392 (Fam.Ct., N.Y.Co., 1964), Cavanagh v. Galamaison 31 A.D.2d 635 (2d Dep't., 1968). Furthermore, public welfare officials are required to furnish indigent children with suitable clothing, books, food, etc. to enable them to attend school. Beyond that, school districts are required to keep accurate records of attendance, and must appoint attendance teachers to enforce the universal education provisions. Discharges or suspensions of students for reasons of mental or physical incapacity, seeking of employment or for disciplinary reasons, are tightly regulated and discouraged.

Thus, the Legislature has established a compulsory education and educational entitlement system to maximize school attendance, on the apparent assumption that all children will profit from a long-term schooling experience.(21) Unfortunately, the New York City school system has engaged in a series of acts and omissions which directly violate both the letter and the spirit of the state law. These include a failure to provide adequate attendance services, employment certificate procedures, auxiliary schools for dropouts, and suspension and exemption procedures. Each of these violations contributes to the truancy and dropout problem and prevents educationally deprived students from receiving meaningful educational opportunities.

A. Attendance Services

The New York State Education Law requires all school districts in the state to appoint supervisors of attendance and attendance teachers (formerly known as truant officers). It also provides for the establishment of an entire bureau of compulsory education, school census and child welfare in the City of New York. The powers of the attendance officers include the right to arrest minors unlawfully absent from attendance upon instruction and the right to enter certain private or public premises to ascertain the whereabouts of any minor required to be in school.

But the duties of the attendance officer are not narrowly limited to arresting truants or assuring their mere physical attendance. The law makes clear that the attendance officer's primary function is to deal with social or educational problems that might interfere with a child's ability to obtain an adequate education:

> "To the end that children shall not suffer through unnecessary failure to attend school for any cause whatsoever, it shall be the duty of each attendance teacher and each attendance supervisor to secure for every child his right to educational opportunities which will enable him to develop his fullest potentialities for education, physical, social and spiritual growth as an individual and to provide for the school adjustment of any non-attendant child in cooperation with school authorities, special school services and community and social agencies."

Similarly, the Manual of Regulations of the New York City Bureau of Compulsory Education includes among the objectives of its attendance bureau such items as "Adequate and adapted services for the nonattendant child and his parent so that the pupil can profitably accept the school experience and adjust to the personal and social requirements of his life" and "Co-ordination of the services of the Board of Education and the resources of the community for meeting the needs of the school absentee."

Although the arrest and entry powers of the attendance officer may relate only to children of compulsory school age, these broader objectives of securing for each child a realistic educational opportunity would appear to require that necessary services be provided all enrolled students up to age twenty-one in order to ensure the full development of their "potentialities." (Indeed, Ed. Law § 2570 specifically requires the Bureau of Compulsory Education to enforce all the provisions of Art. 65, which necessarily would include the educational entitlement provisions of Ed. Law § 3202.)

The failure of the New York City school system to fulfill its obligations under the above cited statutory provisions is apparent. The Bureau of Compulsory Education does not even claim to enforce the rights of seventeen to twenty-one year olds, since its Manual specifically states "The objectives of public education in New York City are sought for

all children of compulsory school attendance age" (emphasis added). Even for those children under seventeen whom it purports to service, the Bureau's minimal resources prevent ony realistic possibility of compliance with statutory requirements.

In the face of steadily deteriorating attendance figures, the number of attendance teachers serving in both the high schools and the elementary and junior high schools has been reduced by approximately 20% over the past four years. This has resulted in case loads as high as 1500 per attendance officer.(22) Although the bureau's Manual requires that all cases of unexplained pupil absence be referred to the bureau on the fifth day of continuous absence, a recent study by the State Comptroller's Office found that fifth-day referrals were not made in 60% of the cases and that 35% of the time referral was made after an average of nineteen days.(23) The fact that official Bureau of Attendance discharge figures for 1972-73 list over 13,000 students as "not found" despite the statutory obligations to keep accurate attendance records and a school census is a further example of the bureau's inability to perform the most minimal basic attendance functions.

The New York school system's failure to provide adequate staff for attendance functions is puzzling in light of the fact that additional attendance staff could be hired at no cost to the city. Since state aid is apportioned to school districts on the basis of average daily attendance,

it has been estimated that a 1% increase in city-wide attendance figures would result in $5 million additional state aid (an amount sufficient to almost double the present number of attendance teachers).[24]

The importance of vigorous adherence to the statutory requirements for provision of attendance services was recently emphasized by the Appellate Division, Second Department in Matter of Geduldig, 43 A.D. 2d 840 (2d Dep't., 1973). The Court there struck down the attempt of one New York City Community School Board to dismiss all of its attendance personnel.[25] Although only the clearcut issue of total abandonment of attendance services was before the Appellate Division, the Court nevertheless indicated that sufficiency of attendance services is a question worthy of further administrative and judicial consideration.

B. Employment Certificate Procedures

As indicated above, all minors from six to sixteen years of age are required to attend upon full time instruction.[26] In addition, in certain school districts - including the City of New York - the board of education may require minors from sixteen to seventeen years of age who are not employed to attend upon full-time instruction. The New York City Board of Education has exercised this option and requires such school attendance until age seventeen.

Although the state requires compulsory school attendance until age sixteen or seventeen, students are entitled to attend public schools until

age twenty-one. Apparently, in order to ensure that students will not lightly exercise the option to leave school before the normal high school graduation age, the statutory scheme does not permit minors under eighteen to leave school for full-time employment without an employment certificate issued by the Board of Education.(27) Although child labor laws may have originally been enacted to ensure that very young children were not permitted to engage in dangerous factory work, (See Labor Law Art.14, Marino v. Lehmaier 173 N.Y. 530, 532-3 (1903)), the vesting of responsibility for the issuance of employment certificates for sixteen and seventeen year olds with the educational authorities appears to have also been motivated by a concern that the child be fully counseled as to his educational needs. Permission to work would be granted only after a careful decision that the student's best interests would be served by permitting such employment. See Amberg v. Kinley 214 N.Y. 531, 538 (1915), Matter of Salvio v. Abercrombie & Fitch 40 A.D. 2d 1056, 1057 (3rd Dep't., 1972).

In accordance with this counseling aim, the procedures for issuance of employment certificates require the applicant to submit evidence of age, physical fitness, prior schooling records, a pledge of specific employment from an employer--and "written consent of the parent or guardian." All certificate forms must also be approved by the Commissioner of Education. Pursuant to these requirements, the New York City Board of Education has established an "exit interview" procedure which is set forth

in Special Circular No.67, 1969-70. The prime stated purpose of thse procedures is:

> "To explore in depth the pupil's reasons for wishing to withdraw from school and to make all possible adjustments that may enable him to continue his education."

The Circular specifically states that the parent or guardian must appear in school to consent to a withdrawal and that the parent and child shall be counseled "on present and future vocational and educational goals." It further requires that "There should be no approval for discharge from school..... unless evidence is presented of an Exit Interview having been conducted....."

If the New York City school system fully complied with the requirements of Circular 67, there is little doubt that many students who might otherwise drop out of school would be counseled against such a move. Appropriate guidance and services might be arranged to secure each such student's "right to educational opportunities which will enable him to develop his fullest potentialities for education," according to state law. Unfortunately, however, it appears that Circular 67 procedures are widely ignored or violated by the principals charged with their enforcement in New York City. A recent report of the State Comptroller's Office stated:

> "Also bypassed in most instances was the [Board of Education] direction that an exit interview be conducted with the dropout."(28)

Furthermore, in many cases where interviews are held, it is obvious that genuine efforts to counsel the student and discourage school-leaving do not take place. In the first place, representatives of the Bureau of Attendance who should have substantial knowledge of the child's problems and potential, apparently do not participate in the exit interviews. Secondly, in many instances, little or no effort is made to require or validate employment pledges and youngsters often are signed out to phantom jobs.(29) Finally, and perhaps most importantly, in a large number of cases, the parents' written consent is not sought or obtained. In many instances parents are merely notified by a form letter that unless the school is contacted within a week, their truant child will be discharged.(30) Since the law specifically requires not only the "written consent of the parent or guardian" but also that "a parent or guardian shall personally appear before the issuing officer or school authorities to indicate consent", it would appear that all discharges which lack explicit parental attendance and consent are invalid.

Even in those cases where parental attendance and written consent is obtained, it is questionable whether the circumstances of the often pro-forma interview provide a reasonable basis for an informed, voluntary decision to waive statutory rights and entitlements.(31) Courts have held in a number of education cases that notice to parents of proposed placements, transfers or discharges must include clear information concerning all available

"alternative educational opportunities". Mills v. Board of Education of District of Columbia 348 F. Supp. 866,880 (D.C., D.C., 1972), Pennsylvania Association for Retarded Children v. Pennsylvania 343 F. Supp. 279,304 (D.Pa., 1972), (hereinafter referred to as "P.A.R.C."). It would seem no less reasonable to require the Board of Education to fully implement its own stated procedures, and to genuinely counsel parents and students of the full consequences of dropping out and of all available options for overcoming educational or social difficulties. Given the reality of high unemployment rates for high school dropouts, it is highly unlikely that close to half of New York's high school students will drop out of school if they are fully counseled and provided appropriate support and services.

C. Auxiliary Schools for Dropouts

As part of a consent decree approved by the Court in P.A.R.C., -- a case challenging the exclusion of certain handicapped children from the public schools - the Attorney General of Pennsylvania agreed to issue an opinion declaring that parents of children under seventeen have a compulsory duty to send their children but not that educational entitlement lapses at that age. The Attorney General ruled that "a child must be granted access to a free, public program of education and training" up to age twenty-one.

The statutory scheme of New York State Education Law similarly indicates an intent by the Legislature to assure that all citizens up to age twenty-one have an equal right to call upon public resources and funds for their educational needs.(32) Even for minors who have decided to seek full-time employment without having attained a high school degree, the Board of Education is required to provide access to programs of occupational education commensurate with their interests and capabilities. Under State Law, the Board is also encouraged to establish day and evening continuing education high schools.(33) Furthermore, a school board is specifically empowered to require that dropouts between ages sixteen and eighteen attend part-time school.

The stated policies of the New York City Board of Education would appear to fully accept these statutory obligations and responsiblities. Thus, Special Circular 67, states as a second major goal of the exit interview procedure:

> "Where withdrawal is unavoidable, to obtain such data as are absolutely essential for referral to existing facilities for counseling education and further training."(34)

The main referral agency described in Circular 67 forms is the Auxiliary Services for High Schools. However, only a small percentage of high school dropouts are presently serviced by this program. In 1972-73,

only 11,543 students--compared with a sixteen to twenty-two year old dropout population of approximately 200,000--attended any of the program's sessions.(35) It is of course true that even if full counseling and encouragement were offered not all eligible youngsters would choose to attend these programs. But no such real option exists since, in violation of the letter and spirit of Circular 67, thousands of dropouts are not being referred to Auxiliary Services or any other programs. Moreover, no follow-up is provided by the Bureau of Attendance or other school officials to maximize the likelihood that dropouts who are referred will successfully adapt to these programs. Even if limitations of space and resources in the Auxiliary Services program provide an excuse for failing to refer all students, "no standards have been established to identify the type of discharged student who should be referred."(36)

In short, even assuming that the Auxiliary Services and other existing dropout referral programs provide realistic alternative educational opportunities, the Board of Education's failure to ensure that all dropouts are given a fair opportunity to attend these programs is in direct violation of statutory requirements and the Board's own stated policies.

D. Suspension Procedure

New York State Law provides explicit procedures for the suspension of disorderly or problematic students. The main requirements are that no student

may be suspended by a principal for more than five school days, further suspensions by the superintendent of schools must be preceded by a hearing on notice with a right to counsel, and decisions to suspend may be appealed to the Board of Education.(37) Much recent litigation and commentary has been concerned with establishing the student's right to fair procedures prior to suspension,(38) but relatively little attention has been paid to the equally important question of what happens to students after they are suspended.

Consistent with the over-all statutory scheme encouraging full educational opportunities for all students up until age twenty-one, the New York Education Law nowhere provides for the expulsion of students, even those who have been found to exhibit serious behaviorial difficulties after a fair suspension hearing. Instead, the law states:

> "Where a minor has been suspended as insubordinate or disorderly and said minor is of compulsory attendance age, immediate steps shall be taken for his attendance upon instruction elsewhere or for supervision or detention of said minor pursuant to the provisions of article seven of the family court act....."(39)

As in the areas of employment discharge and auxiliary services, official Board of Education policy statements purport to fully reflect and follow the non-punitive counseling and placement purposes of the statute. Special Circular 103(1969-70) speaking of suspension hearings, provides that:

> "The important purpose above and beyong meeting the statutory requirements is to provide an opportunity for parents, teachers, supervisors, et al., to plan educationally for the benefit of the child. The community superintendent or supervising assistant superintendent shall make a written statement of his findings, together

> with the determination thereof. Such determination may include among other appropriate measures the pupil's reinstatement, transfer to another school, referral for placement in a School for Socially Maladjusted Children, referral to the Bureau of Child Guidance or other suitable professional agency for study and recommendation."

The United States Court of Appeals for the Second Circuit, accepting at face value such indications of the benign, guidance purposes of suspension procedures, overruled a lower court holding that the due process right of counsel must apply in such situations.(40) Madera v. Board of Education 386 F. 2d 778 (2d Dep't., 1967). In so doing, however, the appeals Court discounted or ignored the detailed findings of the trial Court. (267 F. Supp.356, S.D.N.Y., 1967). There, Judge Constance Baker Motley had discovered that in many cases, "immediate steps for attendance upon instruction elsewhere" were not taken. Specifically, she found numerous instances of students receiving no instruction for seven to twelve months, having been "temporarily exempted" while awaiting placement. The consequences of this situation were elaborated upon by the Court:

> "Such prolonged suspension....must have very serious educational consequences for the child involved. Not only may extended suspension greatly damage a child in his opportunity for education, but in some cases it may be the functional equivalent of an expulsion from the public schools. For a child who has been forced to be out of school eight months and who while so suspended passes the school leaving age, the incentive to return to school under the heavy educational handicap such a long suspension obviously inflicts, must be very small indeed." (See also Vail v. Board of Education 354 F. Supp. 592,603 (D.N.H., 1973).

There is no indication that this pattern of long delay in placement of children on suspension has improved in the past few years.[41] The fact that attendance bureau personnel no longer attempt to follow-up such cases, indicates that the problem may actually be even more severe.[42] In short, it appears that the statutory requirement for immediate provision of alternative educational placement is widely flouted.

Those children on suspension who are not "temporarily exempted" often receive inadequate alternative instruction. One widely utilized alternative is "home-instruction", normally provided for two hours a day (the minimum requirement). It is difficult to understand how a ten-hour per week course of study can be considered compliance with a statutory requirement that all minors attend upon "full-time instruction".[43] See Reid v. Board of Education 453 F.2d 238, 239 (2d Cir., 1972), Walton v. Board of Education 68 Misc. 2d 935, 937 (S.Ct., Nassau Co., 1972).

Many other suspended students are sent to "alternative institutions" (such as New York's "600" schools) established for "problem" children. The suitability of the educational programs provided by these institutions has rarely been raised before the Courts. But see Knight v. Board of Education 48 F.R.D. 115, 116 (E.D., N.Y., 1969), Hunt v. Wilson 72 Misc.2d 360 (S.Ct., Monroe Co., 1972). The Commissioner of Education

has generally afforded wide latitude to boards of education in their placement decisions, both those following a suspension as well as those undertaken for "educational reasons" without resort to specific charges or hearings.(44) See, e.g. Matter of House II Ed. Dep't. Rep. 215, 217 (1972), Opinion of Counsel, I Ed. Dep't. Rep. 744(1951). But, recent federal Court rulings establishing the right of students and parents to be consulted and heard prior to any transfers or placements may establish a basis for more extensive judicial scrutiny of such placements in the future. See P.A.R.C., Mills, see also Wisconsin v. Constantineau 400 U.S. 433 (1971), Kirp, "Schools as Sorters: The Constitutional and Policy Implications Of Student Classification", 121 U.Pa.L.Rev. 705(1973) and cases cited therein.

The foregoing discussion has been concerned with the rights of suspended students of compulsory school age for whom the law requires the immediate provision of alternative instruction. The rights of students over compulsory education age are also of critical importance. In accordance with the entitlement provisions of state law, the Courts have repeatedly held in recent years that such students are entitled to a full hearing before they can be suspended from school or dropped from the rolls for truancy. Knight v. Board of Education 48 F.R.D. 108(E.D.N.Y., 1969), Hobson v. Bailey 309 F. Supp. 1393, 1401 (W.D. Tenn, 1970), George v. Fiore 62 Misc. 2d 429(S.Ct., Erie Co., 1970), Matter of Cuffee 7 Ed. Dep't. Rep. 60(1967).

The more troublesome issue is whether the stated limitation of the requirement for immediate provision of alternative services only to those under seventeen can be interpreted as an implication that students over seventeen can simply be expelled. The Commissioner of Education, obviously troubled by this question, has in a number of cases noted that there is no statutory obligation upon boards of education to ensure the attendance upon instruction of those over compulsory school age. At the same time, however, he has admonished the boards to make every effort "to provide for the pupil's continued education in circumstances best suited to his needs and abilities" (Matter of Cuffee, see also Matter of Reid 9 Ed.Dep't. Rep.166(1970), aff'd. 65 Misc.2d 718(S.Ct., Albany Co., 1971), Matter of Chipman 10 Ed.Dep't.Rep.224(1971)), and has repeatedly overruled expulsion decisions as involving "disproportionate penalties" for the misbehavior at issue. See, e.g. Matter of Lee, Comm.Dec.No.8804 (April 2, 1974), Matter of MacDonald 8 Ed. Dep't.Rep.32 (1968), Matter of Martin 8 Ed.Dep't.Rep.121(1968), Matter of Witham 7 Ed.Dep't. Rep.119(1968), cf. Matter of Gaines 11 Ed.Dep't.129(1971). Consistent with the entitlement provisions and the intent inferred from the Legislature's clear omission of the term "expulsion" from the statutory language,[45] it would appear that the most consistent reading of the law would hold that while boards of education need not provide alternative or continuing services to suspended students over seventeen, such services must be provided for any such students who specifically express a desire for further schooling.[46]

E. Exemption Procedures

In his 1973 decision in Matter of Reid, the Commissioner of Education found that the New York City school system had illegally established a "medical discharge register" system which was used to accomplish the indefinite suspension of students without recourse to statutory suspension procedures or the statutory procedures for exemption of students lacking "proper mental or physical conditions". The Commissioner's prohibition against further utilization of such medical discharges is likely to result in increased resort to suspension procedures, and to the hitherto little-used exemption procedures.

Exemption from instruction is permitted by state law when mental or physical examination reveal that a minor is not in proper mental or physical condition.(47) The Regulations permit renewable exemptions of three to twelve months for physical disabilities upon the recommendation of two physicians; renewable exemptions of six to twenty-four months for severe mental retardation upon the recommendation of a qualified psychologist, or a psychologist and psychiatrist, or by an approved clinic (with the approval of the Education Department, these exemptions can be rendered permanent); and renewable exemptions of up to six months for mental or emotional disorder upon the recommendation of a qualified psychiatrist and psychologist, or by an approved clinic. In the City of New York the designation of qualified physicians, psychologists and psychiatrists is the responsibility of the Chancellor.

The Regulations further provide that notice of the exemption shall be sent to the parent or guardian within ten days of its issuance. Apparently, however, there is no procedure for the affected student or parent to contest the findings or recommendations of the designated examiners. This was clearly illustrated in Matter of Boltja 9 Ed. Dep't. Rep. 149 (1970), a case involving a parent who objected to a school board's decision to exempt his daughter and presented a statement from a psychiatrist stating that she was capable of benefitting from regular classroom instruction. The Commissioner upheld the exemption, stating that the board was free to act solely on the advice of its own medical experts.

Despite the Commissioner's statements in other cases that the exemption procedures "may not be used to punish a recalcitrant pupil or to allow the local school system to evade its responsibility for the education of children who are difficult to handle" (Matter of Ranieri 8 Ed. Dep't. Rep. 179 (1969)), the lack of procedures for parental input or challenge to exemption decisions clearly leaves the door open for abuse.

The original intent of the law, a statute enacted more than sixty years ago, was apparently to avoid possible truancy prosecutions for children (or their parents) who were not physically or mentally capable of attending school. In order to prevent this benign purpose from being distorted into an opportunity for school officials to "push out" children they find difficult to handle, a reasonable interpretation of the statute would hold, as the

Attorney General of the State of Pennsylvania has officially stated in interpreting a similar provision in P.A.R.C., that:

> ".....a parent may be excused from liability under the compulsory attendance provisions of the School Code when, with the approval of the local school board and the Secretary of Education and a finding by an approved clinic or public school psychologist or psychological examiner, the parent elects to withdraw the child from attendance. (The section) may not be invoked by defendants, contrary to the parents' wishes, to terminate or in any way to deny access to free public program of education and training to any .....child." (48)

III. VIOLATION OF THE CONSTITUTIONAL RIGHT TO "SUITABLE EDUCATION"

The foregoing discussion has revealed that present practices of the New York City Board of Education are in apparent violation of at least five areas of state statutory requirements. Litigation before the Commissioner of Education or the State Supreme Court may result in specific orders that would ameliorate these conditions. The results of past attempts to enforce specific state statutory requirements indicate, however, that such administrative or judicial edicts may be honored more in form than in substance. (49) More importantly, however, even the complete elimination of existing statutory violations would not bring about the more fundamental re-orientation of basic attitudes and practices that is necessary to provide an educational environment directly geared to the needs and capabilities of the potential

dropout population.

A judicial decree upholding the right to "suitable education" for all students would provide the broad mechanism needed to compel the school system to seriously and systematically deal with the plight of educationally deprived students. Such a decree would directly and concretely apply to the present situation the concept of equal educational opportunity enunciated in general terms by the U.S. Supreme Court in Brown v. Board of Education 374 U.S. 483, 493(1954), its historic ruling outlawing racial segregation:

> "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied an opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

A Constitutional ruling requiring provision of suitable education for all students might be sought under the equal protection clause of the Fourteenth Amendment of the federal Constitution or under the equal protection (Art. I.§ II) or educational entitlement (Art. XI, § 1) provisions of the state Constitution. A state Court approach would have the advantage of permitting direct supplementary reliance on the broad rights to equal educational opportunity accorded under the state statutory scheme, and might also avoid possible problems raised by the U.S. Supreme Court's refusal to designate the right to education a "fundamental interest"

entitled to strict scrutiny under the Fourteenth Amendment in San Antonio Independent School District v. Rodriguez 411 U.S.1 (1973).[50] On the other hand, the federal Courts have in recent years upheld a number of related claims to meaningful educational opportunity and might be more prone to extend those rulings in the present context.[51]

The strategic question as to whether a remedy might best be pursued in state or federal court need not be discussed further here, since the basic Constitutional concepts and the precedents which can be marshalled to support them are essentially the same in either forum. Accordingly, we will discuss in general terms a number of significant recent cases which appear to establish the basis for asserting a right to a meaningful educational opportunity for all educationally deprived children. This overview will be followed by a brief consideration of whether "manageable standards" exist for affording judicial relief.

A. Precedents Establishing a Right to a Meaningful Educational Opportunity

1. Right of Handicapped Children to a "Suitable Education"

In two recent landmark decisions, the federal Courts have established the right of handicapped children to an equal educational opportunity. In the first of these cases, Pennsylvania Association For Retarded Children v. Commonwealth of Pennsylvania (P.A.R.C.) 334 F. Supp.1257 (E.D.Pa., 1971), 343 F. Supp.279 (E.D.Pa., 1972), plaintiffs, on behalf of all

mentally retarded children in the State of Pennsylvania, challenged the constitutionality, under the Fourteenth Amendment, of certain statutes which on their face, or as applied, excluded retarded children and denied them an equal right to public education. Plaintiffs asserted a denial of equal protection in that the statutes assumed, without any rational basis in fact, that certain retarded children are uneducable and untrainable.(52)

After the suit was filed, the attorneys for the state recognized their obligation "to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity....." 334 F. Supp. at 1260 (emphasis added). The Court then approved and entered a consent decree which required the defendants to submit and implement a detailed plan which "shall specify the range of programs of education and training, their kind and number, necessary to provide an appropriate program of education and training to all mentally retarded children....." 343 F Supp. at 315 (emphasis added). Special masters were appointed for the purpose of overseeing the implementation of the plan and the specific procedural rights incorporated in the decree.

The claims presented to the Court in Mills v. Board of Education 348 F.Supp.866 (D C., D.C., (1972)) were similar to those asserted in P.A.R.C., although the plaintiff class was more broadly defined to include, in addition

to the mentally retarded, the emotionally disturbed or hyperactive, and students manifesting behavioral problems. The Court ordered broad-based relief to prohibit unconstitutional exclusion and other denials of public education, which included a requirement to provide each child with "educational services suited to his needs," and stated that suitable publicly supported education must be provided "regardless of the child's mental, physical or emotional disability or impairment." (348 F.Supp. at 878-9). (emphasis added). Defendants were ordered to file with the Court a comprehensive plan describing services to be provided to the plaintiff class, including programs of compensatory education to overcome "prior educational deprivations." Although a special master was not initially appointed, the Court clearly stated that inaction or delay by defendants in implementation of the decree would result in the immediate appointment of such a master.

The decisions in P.A.R.C. and Mills have been followed by other federal decisions similarly upholding the right of a handicapped child to "education and training appropriate to his age and mental status" Lebanks v. Spears Civ. No. 71-2897 (E.D. La., 1973); see also, Harrison v. Michigan 350 F. Supp. 846 (E.D. Mich., 1972).(53) In addition, section 504 of the Federal Rehabilitation Act of 1973 includes a specific requirement that no handicapped individual be excluded from participation in, or be subjected to discrimination in, any program or activity receiving federal financial assistance.

The P.A.R.C. and Mills cases are usually cited as landmark decisions prohibiting the total exclusion of handicapped children from the public school system. A ban on such total exclusion is already a matter of statutory right in the State of New York (as it was in Washington, D.C.). See also In re Leitner, 40 A.D.2d 38(2d Dep't., 1972), Matter of Reid, supra, Matter of Downey 72 Misc.2d 772(Fam.Ct., N.Y.Co., 1973), Matter of Kirschner 74 Misc.2d 20(Fam.Ct., Monroe Co., 1973). The more basic significance of these cases for our purposes, however, lies in the Constitutional underpinning that was given to existing statutory rights to education and the sweeping relief ordered by the Courts to assure provision of "adequate" education, "suited" to each child's needs. (54)

In considering the framing of relief which would ensure the provision of more than mere custodial services for mentally and emotionally handicapped children, the federal Courts consistently have found it necessary to insist upon provision of meaningful educational programs and services. Similarly, a court presented with the severe problems and handicaps of New York City's dropout population might be persuaded to order the implementation of plans to provide services "suited" to their needs. Just as the mere right to physically attend schools was not considered sufficient relief in P.A.R.C. and Mills, so in the present dropout situation an abstract "right" to attend school which is not accompanied by access to

suitable educational programs is almost meaningless. Students who are "pushed out" by a school system which refuses to provide education suited to their needs are in effect "excluded" and denied their right to public education.

2. Right of Non-English Speaking Students to "Meaningful Education"

Recent cases establishing the right of non-English speaking students to bi-lingual programs provide further, and perhaps even more direct, precedent for the claim that all educationally deprived youngsters are entitled to an education suited to their needs. Most pertinent in this respect is the United States Supreme Court's holding in Lau v. Nicols 94 S. Ct. 786(1974) (which, significantly, was decided after the Court's decision in Rodriguez, supra). In Lau, the United States Court of Appeals for the Ninth Circuit had denied the claim of San Francisco students of Chinese ancestry that they were entitled to special programs to overcome language deficiencies. The plaintiffs did not specify any particular form of relief. They merely asked that the Board of Education be directed to "apply its expertise to the problem and rectify the situation". The U.S. Supreme Court reversed in a decision which strongly emphasized the right of each student to a "meaningful education":

> "The Court of Appeals reasoned that 'every student brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic and cultural background, created and

> continued completely apart from any contribution by the school system'. Yet in our view the case may not be so easily decided . . .
>
> "Under these state-imposed standards,[56] there is no equality of treatment merely by providing students with the same facilities, text books, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education".

Thus, in Lau the Supreme Court might be said to have gone a step further than the Courts in P.A.R.C. and Mills by requiring that "suitable" education be provided, even where students were not being physically excluded from the schools. In rejecting the defense of "cultural neutrality", the Court made clear that boards of education must gear their programs to relate to the specific deficiencies of particular children (in this case language deficiencies), whatever the origin of these problems. Applying the Lau rationale in the high school dropout situation, it clearly can be said that providing students from non-mainstream backgrounds with the "same facilities, textbooks, teachers and curriculum" does not amount to "equality of treatment" under the statutory requirements and entitlements of the New York Education Law. Under these circumstances, students who do not relate to traditional education methods "are effectively foreclosed from any meaningful education."

It should be noted that the Supreme Court's decision in Lau was based on section 601 of the Civil Rights Act of 1964, a provision barring racial

discrimination in any program receiving federal financial assistance, and the Court did not need to decide whether denial of meaningful education amounted to a Constitutional violation under the Fourteenth Amendment. If the designated class of educationally deprived students in the present situation is also composed almost exclusively of minority group students, section 601 and the authority of Lau (56) may be directly invoked. If, however, the subject class is more broadly defined, a court may be required to reach the Constitutional issues.

Decisions of the federal district Courts in cases similar to Lau indicate that, if necessary, a ruling upholding the rights of non-English speaking children to a meaningful educational opportunity will be issued on Constitutional equal protection grounds. Thus, in Serna v. Portales Municipal Schools 351 F. Supp.279 (D.M. Mex., 1972), the Court, using evidence of low scores on IQ and achievement tests as proof of educational deprivation, found a violation of Spanish surnamed students' rights to equal protection, even though a standard educational program similar to that given to white students was provided for them. The Court held that the Fourteenth Amendment required implementation of programs geared to the students' "specialized needs." See also United States v. Texas 342 F. Supp.24,30(E.D Tex.,1971), aff'd.466 F.2d 518(5th Cir., 1972). But cf. Morales v. Shannon 366 F. Supp.813,823 (W.D. Tex., 1973).

Judge Marvin Frankel's recent memorandum decision of April 30, 1974 in ASPIRA v. Board of Education Civ.No.74-4002 (S.D., N.Y.), a case involving Puerto Rican students in the City of New York,[57] indicated that since Lau the concept of Board of Education "liability" to provide meaningful programs for Spanish speaking students was so well established that there was no need to reiterate the specific statutory or Constitutional bases for such rights. In an earlier decision denying defendant's motion to dismiss, Judge Frankel pointed out, however, that "The notion that sharply disparate people are legally fungible cannot survive the Constitutional quest for genuine and effective equality" (58 F.R D. 62,63 (1972)). The school system's assumed "fungibility" of potential dropout children from non-mainstream backgrounds would appear to be no more Constitutionally justifiable than the assumed "fungibility" of non-English speaking students, which has now been banned by the Courts.

3. Right of Inmates to "Suitable Treatment"

In the past few years, a series of federal decisions have strongly upheld the Constitutional right of patients at mental institutions to meaningful treatment, rather than mere custodial care. In the first of these cases, Rouse v. Cameron 373 F.2d 451(D.C.Cir., 1966), Judge David Bazelon held that "The purpose of involuntary hospitalization is treatment not punishment," and he required that "the program provided is suited to

(the patients') particular needs."

The Court in Wyatt v. Stickney 325 F. Supp. 781 (M.D.Ala., 1971) echoed the holding in Rouse, and perhaps went even further, requiring in a follow-up decision not merely "treatment", but services that promise 'habilitation':

> "....people involuntarily committed through non-criminal procedures to institutions for the mentally retarded have a Constitutional right to receive such individual habilitation as will give each of them a realistic opportunity to lead a more useful and meaningful life and to return to society."

After having granted defendants six months time to voluntarily improve services, the Judge determined that a Court order would be necessary to ensure adequate Constitutional compliance. Accordingly, expert opinion was solicited as to minimal acceptable treatment standards and the Court then issued a detailed order specifying the practices that the state agencies must implement, including such items as staffing ratios, development of individualized treatment programs, and regular review and revision of each treatment program. (344 F.Supp. 373, 383-85(1972)). See also Martarella v. Kelley 359 F.Supp.478 (S.D., N.Y., 1973).

Although the Wyatt decision has not been universally followed,(58) the United States District Court for the Southern District of New York, having extensively reviewed the cases in this area, found the Constitutional right to meaningful treatment to be strongly established:

> "There can be no doubt that the right to treatment generally, for those held in non-criminal custody (whether based on due process, equal protection or the Eighth Amendment, or a combination of them) has by now been recognized by the Supreme Court, the lower federal courts and the Courts of New York." Martarella v. Kelley 349 F. Supp. 575,599 (S.D., N.Y., 1972).

The emphasis in the above line of cases upon the right to meaningful treatment for those who are involuntarily confined by the state might be directly analogized to the right to adequate educational services for school children under the age of seventeen who are compelled to attend school involuntarily.(59) But it would also appear that where state statutes (such as Ed.Law section 3202) grant citizens an entitlement to treatment or services, the Courts will also, under the Wyatt doctrine, insist that such treatment be adequate and meaningful. Thus, the class receiving relief from the Court in Martarella included "Persons in Need of Supervision" (often truants) who were referred to the Family Court for institutional placement and treatment by their parents. (N.Y.Fam.Ct.Acct §§ 712,733). See also Inmates of Boys' Training School v. Affleck 346 F. Supp.1354 (D.R.I., 1972). Similarly, in two recent state Court decisions, a right to treatment was upheld for mental patients and delinquents whose parents voluntarily sought services and placements from state agencies. Renelli v. State Commissioner 73 Misc.2d 261 (S.Ct., Rich.Co., 1973), Usen v. Sipprell 71 Misc.2d 633 (S.Ct., Erie Co.,1972), rev'd on other gds., 41 A.D.2d 251 (4th Dep't.,1973).(60)

If the Courts are prepared to require, as a matter of Constitutional right, that state officials actually deliver the substantive services which are the rationale for statutes permitting the confinement or placement of mental patients and delinquents, an analogous claim requiring reasonable fulfillment of the purpose of compulsory education and educational entitlement laws seemingly should also be upheld.

SUMMARY

Thus, direct precedent for a broad-based right to "suitable education" for all educationally deprived students appears to exist in cases prohibiting the denial of 'suitable' public school services to handicapped children, of meaningful education to non-English speaking students, and of adequate treatment to patients or delinquents entrusted to the care of state agencies. Each of these lines of cases taken alone would provide authority for a Constitutional claim on behalf of the potential dropout class.
Taken together, they provide a strong and consistent pattern of judicial insistence that state statutes which articulate a universal entitlement to education and related services must be implemented in a manner which will provide meaningful substance and not abstract form. Under these precedents, it would be logical and plausible to maintain that all educationally deprived youngsters, and not just those who are handicapped, non-English speaking or institutionally confined, be guaranteed provision of services and programs

reasonably "suited" to their educational needs.

B. Manageable Standards

Articulation of a right to "suitable education" for all educationally deprived students may be a futile exercise resulting in summary rejection by the Courts if plaintiffs are not able to frame specific remedies to rectify existing deficiencies. The Court in McInnis v. Shapiro 293 F.Supp.327 (N.D.Ill., 1968), aff'd. subnom. McGinnis v. Ogilvie 394 U.S. 322 (1969), the first major attack on unequal educational financing laws, refused to grant relief because plaintiffs, asserting a "nebulous concept" of "educational needs", were unable to convince the Court that there were "discoverable and manageable standards" that would allow it to properly grant relief. Although much further analysis and clarification of possible remedies in the present situation needs to be undertaken, additional precedents and legal developments since the time of the decision in McInnis indicate that 'manageable standards' can be established.(61) The development of such standards can be discussed under the following specific headings: provision of equal resources, bona fide efforts to provide suitable education, and attainment of minimum education standards.

1. Provision of Equal Resources

Aware of difficulties encountered by the plaintiffs in McInnis, attorneys in later financing reform cases have avoided broad requests for satisfying all "educational needs." They have instead concentrated on the

specific proposition that since there is a significant correlation between funding and the quality of educational opportunity, the state has a Constitutional obligation to rectify wide disparities in the financial resources of local school districts. This proposition has been largely accepted by many state courts. See, e.g. Robinson v. Cahill 303 A.2d 273,277(S.Ct.,N.J.,1973), Serrano v. Priest 487 P.2d 1241,1253(S.Ct., Calif.,1971). See also, Hobson v. Hanson 327 F. Supp. 844,860(D.C. D.C ,1971). The United States Supreme Court in Rodriguez refused to upset the traditional pattern of local financing of education, but it did not reject the contention of a significant correlation between dollar input and educational opportunity, and may well have held differently if it had not found upon the record before it that the Texas education system provided a minimum adequate education for all students.

A claim in the present situation for relief framed in terms of equal dollar expenditures would, of course, not be complicated by the troublesome local control issues which were central to the above inter-district financing reform cases. As indicated above, the New York Board of Education provides substantially less per capita funding for educationally deprived students than for mainstream students. This inequity exists purely on an intra-district basis within the City School District of the City of New York and no re-alignments of governing authority or implications of centralized state control would be involved in rectifying the situation. Judge J. Skelly

Wright had little difficulty in Hobson v. Hanson, in enjoining the highly analogous economic discrimination manifested within the Washington, D.C. school system where he found per capita expenditure differentials of 27% and a pattern of assignment of less experienced teachers to the inner city schools.

In short, the Board of Education's failure to provide equal per capita expenditures on an intra-district basis provides a clear, indisputably "manageable" standard for assuring minimal educational opportunity. Other specific, measurable deprivations, such as assigning non-mainstream children to schools on double or triple session, or affording suspended students two hours per day of home instruction, would similarly provide a court with precise, justiciable yardsticks.

2. Bona Fide Efforts to Provide Suitable Education

In his landmark ruling in Rouse v. Cameron 373 F.2d 451,456 (D.C., Cir., 1966), upholding the right to treatment, Judge David Bazelon stated:

> "The hospital need not show that the treatment will cure or improve him but only that there is a bona fide effort to do so."

In a later article ("Implementing the Right to Treatment" 36 U.Chi.L.Rev. 742,745(1969)), the Judge stated that courts could enforce standards in this area through reliance on professional advice, just as courts rely on detailed expert opinions in scrutinizing railroad rates, airplane designs or

dam-building. A workable standard would be:

> "Whether the patient is receiving carefully chosen therapy which respectable professional opinion regards as within the range of appropriate treatment alternatives, not whether the patient is receiving the best of all possible treatment in the best of all possible mental hospitals.

Applying such a bona fide effort standard here would require the Board of Education to satisfy the Court that it is attempting in good faith to implement services and programs which are generally considered suitable by educational experts, especially those in the field of dropout prevention.(62)

(62) See Wyatt, supra, Martarella, supra, U.S. v. Texas, supra.

Other standards for enforcement of a bona fide effort plan would lie in judicial comparisons of expenditures and programs in other urban areas which have been able to more successfully avoid large scale dropouts and educational deficiencies,(63) or in procedural requirements that the Board itself make a bona fide effort to pinpoint the problems, present a plan to meet the problems, and ensure that its plan is fully staffed and funded and is continuously upgraded as necessary.(64)

3. Attainment of Minimum Educational Standards

Equality of educational opportunity obviously cannot, in this world of varying talents and abilities, mean assurance that all students will achieve the same level of proficiency, but it can mean that each child is guaranteed:

> ".....That educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market." Robinson v. Cahill 303 A.2d 273, 295(S.Ct., N.J., 1973).

In other words, it would appear reasonable to require the state to provide each child with an educational program which will assure that he achieves minimal competency in basic areas of achievement.(65) Such minimal standards might be expressed somewhat broadly in terms of "minimal skills necessary for the exercise of free speech and of full participation in the political process" (Rodriguez), or more narrowly in terms of assuring certain levels of attainment in reading, writing, arithmetic, etc.(66)

Such a minimal attainment standard would be more of a burden of proof requirement than an unyielding demand that the state teach all children to read at a specified level, if in fact some individuals, despite all diligent efforts, simply are incapable of achieving such competency. Thus, realistic minimal standards of anticipated universal achievement would be set. If there were significant failures of particular students--and especially of groups of students in particular schools--to achieve these results, the Board of Education would be required to show that all reasonable efforts had been taken to avoid such failures.(67) As in Mills and P.A.R.C., there would be an operative assumption that all children are minimally educable, unless, in particular instances, the Board could

prove otherwise.

It is clear that the first of the suggested enforcement approaches, provision of equal resources, is the most "manageable" and would involve the least degree of judicial involvement in the workings of the school system. This approach, however, is also the least likely to assure full relief for educationally deprived students who undoubtedly need additional, and not merely equal, expenditures and services. A requirement of bona fide efforts would necessarily result in broad-based implementation of new programs designed to deal directly with the serious learning problems of disadvantaged youngsters, but the articulation of minimal attainment standards is the approach most likely to fully assure that the most intensive possible efforts are taken to guarantee a meaningful right to education for all students.(68) From a strategic point of view, the three suggested approaches might best be presented to a court in inverse order, emphasizing the superiority of the minimal attainment standard, but acknowledging bona fide efforts and equal provision of resources as possible alternatives.

Whatever the enforcement mechanism chosen by a court, however, there is no doubt that implementing the right to a meaningful education for all students will require fundamental revampings of existing school programs and substantial increases in educational expenditures. Available evidence indicates that over the long run, society will reap rich economic dividends from a substantial investment in effective dropout prevention programs.(69)

But, if state officials are not inclined to voluntarily provide such funds, the Courts have expressed in similar situations no hesitancy to order whatever additional funding is necessary. The Court in Mills, citing the U.S. Supreme Court's holding in Goldberg v. Kelly 397 U.S. 254 (1969), specifically held that a failure to provide necessary educational services "cannot be excused by the claim that there are insufficient funds.":

> "... ..the District of Columbia's interest in educating the excluded children clearly must outweigh its interest in preserving its financial resources."

In short, if a Constitutional right to "suitable education" for all students is established, appropriate enforcement mechanisms can be devised and necessary funds will be made available. Despite the difficulties involved, the critical importance of assuring minimally adequate education for the almost 50% of New York City students who are potential dropouts justifies resort to the strongest possible corrective action.

FOOTNOTES

1. The Fleischmann Report on the Quality, Cost and Financing of Elementary and Secondary Education in the State of New York (1973), Vol.I, Table I-18, p.35. Official New York City Bureau of Attendance figures for 1972-73 show that 31,780 students were "discharged" from the New York City high schools without receiving diplomas (an additional 3,663 were listed as "not found"), as compared with 53,719 graduates. Several thousand other students were apparently discharged without diplomas for reasons of "physical disability", "mental disability", "home instruction", etc.

2. The Fleischmann Report, Vol.I, Table I-19, p.37.

3. Trevor Cushman, "Those Who Make It, A Preliminary Report on a Possible Measure of High School Productivity" (1974), Fund for the City of New York, mimeo. pp.3-5. Cushman finds that the over-all graduation percentage at 57 academic high schools surveyed was 61.23% in 1973, compared with 63.31% in 1970. He also notes that according to U.S. Bureau of Census figures, 77% of all high school senior age young people in the United States received high school diplomas in 1973.

4. New York City Bureau of Attendance official figures.

5. Office of The New York City Comptroller, "Declining Attendance in New York City's School System" (1971), p.3. New York's average daily attendance is substantially lower than that of other major American cities. Id. at 8,9.

6. New York City Bureau of Attendance official figures. Example cited Benjamin Franklin High School, average attendance 49.19%. cf. C.H. Hughes H.S. 51.48%, Haaren H.S. 60.37%, Clinton H.S. 60.46%, Wingate H.S. 63.58%, Eastern District H.S.54.9%.

7. Daniel Schreiber, ed. The School Dropout (NEA,1964), p.3

8. A 1972 study prepared by Henry M. Levin for the Senate Select Committee on Equal Education Opportunity found that national welfare and crime expenditures attributable to inadequate education are about $6 billion per year. Study cited in National School Public Relations Association, Dropouts: Prevention and Rehabilitation (1972), pp.53-54 (hereinafter referred to as "Dropouts").

9. Author's interview with Eugene O. Cavanagh, Acting Director, Bureau of Attendance, May 16, 1974. Cavanagh states that despite accelerating truancy rates, the number of attendance teachers in New York City has declined from 472 to 374 in the past four years.

10. Dropouts, n.8, supra at 4.

11. Despite the federal government's recent emphasis on career education, most high school vocational programs have still been found to be inadequate and unrelated to actual career needs. See, "Report of the National Panel on High Schools and Adolescent Education" (Discussion Draft, 1974), Chairman's Introduction, p.5. For a good overview of the pros and cons of "career education," see the March, 1974 issue of Inequality of Education (Harvard Center for Law and Education) which was devoted entirely to this subject. See also LaDuca and Barnett "Career Education: Program on a White Horse", N.Y.U. Education Quarterly, Spring, 1974, p.6. Note also that admission to vocational high schools in New York City has apparently become increasingly selective, thereby denying entrance to career education programs for many potential school leavers.

12. "The ratio of mental health services is one clinician to 5,000 students, the ratio of attendance service is one attendance teacher for every 3,000 pupils and the guidance service ratio is one counselor for every 1,200 students." William Jesinkey and Jane S. Stern, "Lost Children - A descriptive Study of the System for the Education of Emotionally Handicapped Children in the City of New York" (Whitney Foundation, 1974), p.150.

13. George B. Brain, on the basis of a survey of superintendents of large city school systems throughout the United States, has compiled a list of "negative practices" which tend to promote school dropouts. This list includes such items as rigid grouping procedures, failure to provide special services and suitable curricula adaptations, failure to follow up problem cases after referrals to outside agencies, etc. He also compiled a list of fifteen "positive practices" which would, according to the experts surveyed, substantially ameliorate dropout problems; these include the provision of work-study programs, early identification and provision of services for potential dropouts, establishment of distinct curriculums for below-average students, etc. Brain, "Administrative and Supervisory Practices Affecting the School Dropout" in Daniel Schreiber, ed, The School Dropout (NEA, 1964) at 135. Significant variations in truancy and dropout rates among schools having populations of similar socio-economic background indicate that programmatic variations clearly can result in substantial improvements. See Cushman op.cit., n.3, supra. See also, New York State Office of Education Performance Review, "Some Factors Influencing Reading Achievement: A Case Study of Two Inner City Schools," (Albany, March, 1974), Shapiro, "Finishing School," New York Times Magazine, March 24, 1974, p.36. See also, "Report of The National Panel on High Schools", n.11, supra.

14. See, e.g. Office of the New York City Comptroller, "The Forgotten Children, A Second Study of School Truancy," (1972) p.17-18.

15. For a survey of these programs see Stern, "Lost Children", n.12 supra. Stern estimates that total enrollment in all of these programs is about 5,500.

16. See cases on file with Queens Lay Advocate Service, 149-05 79th Avenue, Flushing, New York. See also discussion of "exit interview" procedures infra at 15ff. A report on "Safety in Our Schools" prepared by the National Conference of Christians and Jews (Queens region) (June 10, 1974), recommends at p.12 that all seventeen year olds who have not made "adequate progress" toward graduation be transferred to auxiliary schools (for a discussion of the auxiliary schools see p.17., infra).

17. Jacob Landers "Unequal Schools In New York City", Integrated Education, Jan-Feb., 1973, p.9. See also, other statistical data and school-by-school comparisons cited Id. at 8-11.

18. Testimony before Senate Select Committee On Equal Educational Opportunity, Oct.5, 1971, quoted in Dropouts, n.8, supra at 2.

19. K. Alexander and Jordan, Legal Aspects of Educational Choice: Compulsory Attendance and School Assignment (National Organization on Legal Problems of Education, 1973), p.9.

20. "Today, a system of public education which did not offer high school education would hardly be thorough and efficient. The Constitution's guarantee must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market. Robinson v. Cahill 303 A.2d 273,295 (S.Ct.,N.J., 1973). See also, Yoder v. Wisconsin 406 U.S. 205,222 (1972), Dixon v. Alabama 294 F.2d 150, 157 (5th Cir., 1961), Knight v. Board of Education 48 F.R.D. 108,112 (E.D.N.Y., 1969).

21. Alexander and Jordan (op.cit., n.20 supra at 2-3) articulate the reasons behind the state's interest in terms of assuring the important cultural, economic and social values of education. First: "The benefits of education lie principally in the promoting of citizenship, moral and ethical character, and appreciation of civilization." Secondly: "Free education provides an opportunity for individuals to secure a livelihood and economic independence. Aside from private interests, the society has an economic interest in the external benefits of education, the 'spillovers' to society." Finally: "Education [provides] a means for personal social mobility." See also Madera v. Board of Education 267 F. Supp. 356,370(S.D.N.Y., 1967), rev'd on other gds., 386 F.2d 778(2d Cir., 1967).

22. Author's interview with Eugene O. Cavanagh, Acting Director, Bureau of Attendance, May 16, 1974. See n.9, supra.

23. Office of The State Comptroller, "Audit Report On Corrective Action Taken On Recommendations To Improve The Administration of Regulations and Procedures For Truant Students and Dropouts New York City Board of Education" (Draft Report #N.Y.C.64-74, March 18, 1974), p.1.

24. Estimate of Eugene O. Cavanagh, Acting Director, Bureau of Attendance, at author's interview, May 16, 1974.

25. Pursuant to Ed. Law §2590 et seq, Community School Boards are vested with basic authority over elementary and junior high schools in the City of New York. Operation of senior high schools remains with the central authorities.

26. In the states of California, Hawaii, Ohio, Oklahoma, Oregon, Utah and Washington, compulsory school attendance is required until age 18. Alexander and Jordan, op.cit. n.19, supra, Table A-4 at 62.

27. Employment certificates are also issued for part-time or vacation non-factory work by minors aged fourteen or fifteen and for part-time or vacation work by sixteen or seventeen year olds still attending school (Ed.Law §3216). Certain specified types of occasional or part-time employment such as caddy service, baby sitting, household chores, and farm work (Ed. Law §3215) are permitted without a certificate. Part-time service by minors in street trades such as bootblacking (Ed.Law §3227), newspaper carrier work (Ed.Law §3228) and theatrical performances (Ed.Law §3229) require special permits issued in a manner similar to the procedures for employment certificates. Ed.Law §3225 provides that a special employment certificate, apparently permitting full-time, non-factory work, may be issued to fifteen year olds who are exempted from instruction pursuant to the provisions of Ed. Law §3208. (see discussion infra at 26ff.) See also Ed. Law §4606(6).

28. State Comptroller's Report, n.23, supra at 2. A basic inconsistency within Circular 67 itself may be a partial cause of the problem. After specifying in detail the requirements for conducting exit interviews, the next-to-last paragraph states "For youth who are discharged without ever appearing, we ask that you complete as much of the withdrawal form as possible." This unexplained assumption that in some cases an exit interview will not be held, may easily translate at the operational level into a practice of omitting the interview in any case where it would be "inconvenient" (or inconsistent with a principal's conscious or unconscious desire to be rid of a difficult child).

29. Case studies on file in offices of Alternative Solutions for Exceptional Children (A.S.F.E.C.), 29-28 41st Avenue, Long Island City, New York 11101.

30. State Comptroller's Report, n23, supra at 2, 4. The report documents specific instances of previous parental consent obtained for other purposes being used a year later as a basis for a discharge.

31. Compare in this regard the legal standard for voluntariness and informed consent applied by the Courts in cases of criminal confessions or waiver of specific Constitutional rights. See, e.g. Johnson v. Zerbst 304 U.S. 458 (1938), Schneckloth v. Bustamonte 412 U.S. 218 (1973). See also, Mnookin, "Foster Care--In Whose Best Interest" 43 Harv. Ed. Rev., 599,601 (1973). The Courts have specifically struck down alleged waivers of rights which were granted "in submission to authority" Johnson v. United States 333 U.S. 10,13 (1948) and have held that the issue of consent is to be determined "against the totality of all the circumstances, including . . . age, family background, schooling . . . and his relative experience." United States v. Fay 242 F.Supp.273,278 (S.D. N.Y., 1965). The duty to inform is not met, especially, in situations involving minors, by "perfunctory statements and routine inquiry." (Id. at 278). See also, In re Gault 387 U.S. 1,42 (1966), Matter of Lawrence S. 29 N.Y. 2d 206,208 (1971).

32. Cf. Ed. Law S4404 (4) which specifically requires that school districts in which ten or more handicapped children can be grouped homogeneously must provide instruction adapted to their needs until the end of the school year in which they attain their twenty-first birthday. For an indication of this provision see Elgin v. Silver 9 A.D.2d 645 (1st Dep't., 1959).

33. All minors aged seventeen to twenty-one who are unable to speak, read and write English on a fifth grade level are required by law to attend such evening schools. (Ed. Law S3207).

34. See also, N.Y.C. Board of Education By-Laws S85 "Evening Schools" and Minutes of April 24, 1963, Item 43: "Boys and girls may leave school at age 16 only if they are participants in one of the educational programs for dropouts established by the Board of Education.

35. Memorandum of William Jesinkey, Executive Director, A.S.F.E.C., November 29, 1973. Jesinkey also points out that job counseling, rather than continuing education, is the prime thrust of the program. In 1972-73, only 7% of the clients received High School Equivalency diplomas, while almost 2,000 were placed in gainful employment.

36. State Comptroller's Report, n.23, supra at 7. According to Jesinkey (op. cit., n.35, supra), only 27% of Auxiliary Services clients are referred through the exit interview procedure. Most of the others are self-referred or referred by other agencies.

37. Bureau of Attendance figures for 1972-73 show approximately 4,000 principals' suspensions and approximately 550 superintendents' suspensions for high school students.

38. See, e.g. A. Levine, The Rights of Students: The Basic ACLU Guide to a Student's Rights (N.Y., 1973), and Robert Phay, Suspension and Expulsion of Public School Students (NOLPE, 1971), and cases collected therein. The most exhaustive judicial analysis of suspension problems in New York City is contained in Madera v. Board of Education 267 F.Supp. 356 (S.D., N.Y., 1967), rev'd. 386 2d 778 (2d Cir., 1967).

39. Cf. Mills v. Board of Education 348 F.Supp. 866, 878 (D.C., D.C., 1972): "Defendents shall not suspend a child from the public schools for disciplinary reasons . . . without providing for his education during the period of any such suspension."

40. Subsequent amendments to Ed.Law S3214 specifically granted the right to counsel which the Second Circuit had declined to order.

41. See cases on file at offices of A.S.F.E.C.

42. Author's interview with Eugene O. Cavanagh, Acting Director, Bureau of Attendance, May 16, 1974.

43. Many children placed on home instruction apparently do not even receive the minimum 10 hour a week course of study. Matter of Reid, supra, cf. Matter of Valentine 10 Ed.Dep't. Rep.53 (1970).

44. The Commissioner's latitude may in practice tend to encourage boards to transfer problem children to "alternative facilities" without bothering to go through the cumbersome suspension process.

45. Compare N.H.Rev.Stat.Ann.S189: 1-a as cited in Vail v. Board of Education 354 F.Supp. 592,601 (1973): "It shall be the duty of the school board to provide, at district expense, elementary and secondary education to all pupils under twenty-one years of age who reside in the district, provided that the board may exclude specific pupils for gross misconduct or for neglect or refusal to conform to the reasonable rules of the school . . ."

of Utah Civ. No.182646 (Dist.Ct.,Utah,1969). But cf. Robinson v. Cahill 303 A.2d 273,282(S.Ct.,N.J.,1973).

The refusal of the U.S. Supreme Court to apply the strict scrutiny standard requiring the state to show a "compelling" need to maintain its challenged policies in Rodriguez, a case asserting the rights of residents of low tax revenue school districts to greater funding equality, may not be fully relevant to an attempt to bring the present problem before the federal Courts. In the first place, the class of educationally deprived students in New Yorkwould be composed mainly of members of racial minority groups, whose assertions of unequal treatment are traditionally granted strict scrutiny by the Court, even if a "fundamental interest" is not at stake. See, e.g. Korematsu v. United States 323 U.S. 214,216(1944); Loving v. Virginia 388 U.S. 1,8-9(1967). Second, even if the class is more broadly defined to include disadvantaged students from non-minority backgrounds, the educationally deprived might possibly qualify for strict scrutiny treatment under the precedent of the wealth discrimination cases cited by the Court, since the present deprivation of educational opportunity may well be considered "absolute," as compared with the situation in Rodriguez where plaintiffs did not seriously attempt to refute the State's contention that its financing scheme provided a minimally "adequate education." See also, Michelman, "On Protecting the Poor Through the Fourteenth Amendment" 83 Harv.L. Rev. 7(1969).

Of equal significance, however, is the fact that invocation of the "strict scrutiny" standard may not be necessary in order to vindicate the rights asserted here. In Rodriguez, the locally oriented school financing scheme was held to be "rationally related" to a legitimate state aim, namely the preservation of local financing and local control over education. In the present situation, by way of contrast, there would appear to be no rational basis for maintenance of an educational approach which fails to provide services and programs related to the needs of the most educationally deprived half of the student population and thus systematically excludes them from obtaining an "adequate education." See P.A.R.C., supra at 283 n.8, Mills, supra at 870, Larry P. v. Riles 343 F.Supp.1306 (N.D. Calif., 1972). Thus even under the "lesser" Constitutional standard applied in Rodriguez, a federal Court would have strong grounds for invoking the equal protection clause and granting the requested relief. (Note also, recent indications of a growing trend in the federal Courts to "revitalize" the "rational relationship" test and thus lessen the traditional wide disparity in judicial scrutiny given to cases involving "fundamental" rights as against cases involving "non-fundamental" rights. See, e.g. Green v. Waterford Board of Education 473 F.2d 629,633(2d Cir.,1973) and cases cited therein, Chance v. Board of Examiners 458 F.2d 1167,1177(2d Cir.,1972), Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission 354 F.Supp. 778,787 (D.Conn.,1973), mod on other gds., 482 F.2d 1333(2d Cir.,1973), Gunther, "In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection" 86 Harv.L.Rev. 1,18(1972).

46. Presumably such a decision would be made only after adequate counseling on available options. See discussion supra at 14ff.

47. Ed. Law S3214(3) also permits the school board the option of applying suspension procedures, instead of the exemption procedures of Ed Law S3208, in the case of a minor "whose physical or mental condition endangers the health, safety or morals of himself or of other minors." Since the requirements for immediate provision of alternate instruction of S3214 (3) (e) apply on their face only to "a minor who has been suspended as insubordinate and disorderly," those students found to be "lacking proper mental or physical condition," but who have not been guilty of specific acts of misbehavior, theoretically could be indefinitely suspended under §3214 without benefit of the examination prerequisites of §3208. (See also, the application of suspension procedures to "feeble minded" minors pursuant to Ed. Law §3214 (3) (a) (3).)

48. Although in general the language of Ed. Law §3208 parallels that of the Pennsylvania statute (24 Purd. Pa. Stat. §13-1330 (2)), and can thus be read as permitting exemption only with parental consent, subdiv. 2 of the New York law also includes a special subcategory of a minor "whose physical or mental condition . . . would endanger the health and safety of himself or of other minors" or "who is feebleminded;" and the statute specifically states that such children shall not be permitted to attend (emphasis added). However, the category of students described in subdiv. 2 precisely parallels the groups described as being subject to suspension procedures in §3214 (3) (a) (2), (3) (see n.47, supra). Thus, a reasonable reconciliation of the entire statutory scheme would hold that these students might be subject to exemptions or suspensions against their will, after they had been accorded the procedural rights of §3214, but that all other allegedly physically or mentally incapacitated students may be exempted only with parental consent. See also, Marlega v. Board of School Directors of Milwaukee civ. No. 70-C-8(E. D. Wis., 1970) where the Court ordered a full hearing and rights of medical consultation with parents prior to a medical exclusion.

49. See e.g., the inadequacy of the New York City Board of Education's implementation of the Commissioner's order to provide "suitable educational facilities" for socially and emotionally handicapped students historically attending "Junior Guidance Classes" (Matter of Nazario 11 Ed. Dep't. Rep. 110(1971) as described in a memorandum of Jane Stern (A.S. F.E.C., Jan. 14, 1974). It is too early to judge the adequacy of the Board's implementation of the Commissioner's broader order in Matter of Reid, supra.

50. Education has been held to be a "fundamental interest" entitled to strict scrutiny under state equal protection clauses. See, e.g. Serrano v. Priest 487 P.2d 1241 (S.Ct., Calif., 1972), Wolf v. Legislature of State

51. There is, of course, a possibility that a federal Court might "abstain" from deciding these issues and remand the case to the state courts. The U.S. Court of Appeals in Reid v. Board of Education 453 F.2d 238 (2d Cir., 1972) held that where New York law is unclear and a state decision might avoid reaching the federal questions, the federal courts should abstain. See also, McMillan v. Board of Education 331 F. Supp. 302(S.D., N.Y., 1971). More recent cases, however, indicate a lessening tendency to abstain by the federal Courts. For example, in New York State Association for Retarded Children v. Rockefeller 357 F.Supp. 752 (E.D., N.Y., 1973), the Court specifically distinguised Reid, relying on the more recent U.S. Supreme Court ruling in Lake Carriers' Association v. MacMullan 406 U.S. 498(1972), and pointed out that where official practices are at issue, rather than specific state statutes, and where time is of the essence, abstention (which in any event, is a discretionary matter), should not be invoked. For other cases where federal Courts have refused to abstain, see e.g., P.A.R.C., supra 343 F.Supp. at 298-300, Martarella v. Kelley 349 F.Supp. 575 (S.D., N.Y., 1972), LeBanks v. Spears Civ.No. 71-2897(E.D., La., 1973).

52. Plaintiffs in P.A.R.C. also asserted a denial of due process in that there was no provision for notice or hearings before a retarded child was excluded from school or assigned to a special program. The consent decree and order in P.A.R.C. and Mills, supra, guaranteed the plaintiff classes such due process rights.

53. For an up-to-date compendium of filings and decisions in this area see "A Continuting Summary of Pending and Completed Litigation Regarding the Education of Handicapped Children," published by the Council for Exceptional Children, Reston, Va. Language somewhat inconsistent with the broad rights to education established in P.A.R.C., Mills, and subsequent cases appeared in the earlier case of McMillan v. Board of Education 430 F.2d 1145 (2d Cir., 1970).

54. Note also that many of the "problem" youngsters included in the plaintiff class in Mills overlap with the potential dropout population at issue here.

55. The decision in Lau pointed to "state-imposed standards" which required compulsory education, and emphasized the importance of English language proficiency, which was not being taught to members of the plaintiff class. New York similarly requires compulsory school attendance and emphasizes proficiency in basic skills which are not being taught to the potential dropout class.

56. Note, however, that some (although not all) of the H.E.W. guidelines for enforcement of §601 which were cited by the Court in Lau, spoke specifically in terms of rectifying language deficiencies.

57. As in the handicapped exclusion cases, there is a significant overlap between the members of the plaintiff class in ASPIRA and the larger class of educationally deprived students under consideration in this memorandum. Thus, the complaint in ASPIRA alleges that "Approximately 70-80% of all plaintiffs drop out of school before completion."

58. The Court in Burnham v. Department of Public Health 349 F. Supp. 133(N.D.,Ga.,1972) held that treatment of mental patients raised state law issues and did not rise to a showing of a deprivation of a federal Constitutional right, especially since the plaintiff class apparently included many patients who were not involuntarily confined. Similarly in New York State Association for Retarded Children v. Rockefeller 357 F.Supp. 752(E.D.,N.Y.,1973), the Court was skeptical of the Constitutional holdings in Wyatt. Much reliance was placed upon the Court's reading of the U.S. Supreme Court's ruling in Rodriguez, n.50, supra, as holding that there is no Constitutional requirement to equalize educational opportunity. This interpretation does not seem justified by a full reading of Rodriguez, where the Court emphasized at several points that, according to the record, all students in Texas were receiving a minimum adequate education (Rodriguez must also be read in the light of the U.S. Supreme Court's later pronouncements in Lau, supra at p.35). Furthermore it should be noted that the Court in Rockefeller, despite its reservations about Wyatt's sweeping Constitutional holding, and its finding that the state officials were already attempting to raise standards of care, nevertheless ordered limited relief to ameliorate the "inhumane conditions" it found at the institution. (See also Renelli v. State Commissioner 73 Misc.2d 251,262-3(S.Ct.,Rich. Co.,1973), a contemporaneous state court decision concerning a patient at the same Willowbrook School, which strongly relied on Wyatt in upholding a patient's right to "adequate treatment" under state law and the federal Constitution.

59. Such an analogy was explicitly made in Merle McClung, "Do Handicapped Children Have a Right to Minimally Adequate Education?" Harvard Center for Law and Education, Classification Materials (Sep't.,1973), 318,329 and in G.M. Ratner, "Remedying Failure to Teach Basic Skills," Inequality in Education (Harvard Center for Law and Education, June, 1974) 15, 18.

60. The alleged class in Usen included virtually all indigent mentally handicapped children in Eric County. Although the Appellate Division agreed with the lower Court that the State agencies should be required to show that the two named children in the proceeding were not being denied "proper services or facilities," it held that, in the face of widely divergent individual needs, a class action did not lie and that under the circumstances of the case, an evidentiary

hearing before the Family Court, rather than a mandamus proceeding in Supreme Court, was the appropriate procedural route.

61. For an interesting discussion of the pendulum swing away from judicial deference to educational decision-makers see S. Goldstein "Reflections on Developing Trends in the Law of Student Rights" 118 Pa.L.Rev. 612(1970).

62. See n.13, supra. Presumably, following the precedent of the right to treatment cases, such experts would directly consult with the Court and participate in the drafting of appropriate remedial plans.

63. See Ratner, op.cit., n.59, supra at 17.

64. See Tyll Van Geel "Does the Constitution Establish a Right to an Education?" 82 U. of Chi. School Review 293, 312(1974). The claim asserted by the plaintiff in the complaint recently filed in Peter W. Doe v. San Francisco Unified School District et al (Civ. No. 653-312, Superior Ct., Calif.) similarly alleges a failure upon the part of the school authorities to make a bona fide effort to carry out their statutory obligations to deliver services, provide information to parents, etc. The allegations in Peter Doe, however, are framed in terms of a negligence action for money damages, an approach which would appear largely inapplicable in accomplishing the broad-based system-wide educational reform being sought herein.

65. Cf. The analysis of Constitutional equal protection requirements in terms of "minimum protection" contained in F. Michelman "On Protecting the Poor Through the Fourteenth Amendment" 83 Harv.L.Rev. 7(1969).

66. See cases cited at n.20, supra; see also, Ratner, op.cit.,n.60, supra, McClung, op.cit., n.59, supra at 324.

67. See Paul Tractenberg, "Reforming School Finance Through State Constitutions:Robinson v. Cahill Points the Way" 27 Rutgers L.Rev. 365, 456-7(1974).

68. The distinction between "minimum standards" and "bona fide efforts" might be analogized to the difference between the requirement for "habilitation" in Wyatt and the call for "suitable treatment" in Rouse (see p45, supra). The minimal standards approach can also to a certain extent be considered to be simply a demanding enforcement mechanism to ensure that bona fide efforts are actually made to meet the educational needs of all students.

69. Henry M. Levin estimates that the failure to attain a minimum of high school completion among the population of males 25-34 years of age

in 1969 cost the nation $237 billion in income over the lifetime of these men and $71 billion for such schooling. See study cited in Dropouts, op.cit., n.8, supra at 53.